



January 25, 2001

Mr. Emory Camp  
Ellett, Camp, Magre, and Glaser, P.C.  
P.O. Box 386  
Rockdale, Texas 76567

OR2001-0302

Dear Mr. Camp:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143575.

The City of Rockdale (the "city"), which you represent, received two requests from the same requestor which collectively seek the following:

1. The personnel files of three named individuals.
2. A 1998 "arrest report" described by the requestor.
3. "Incident Report conducted by [the requestor] on [a named individual] for Endangering a Child."

You have submitted for our review information responsive to the requests, contained in files we have marked as file 1, 2, 3, and 4. You assert that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

At the outset, we note that it does not appear from our review of the submitted information that you have submitted for our review any information responsive to item 3 above. Among other requirements, the city was required to submit to this office a copy of the specific information requested, or representative samples if the information is voluminous, not later than the fifteenth business day after the date of receiving the written request. *See Gov't Code*

§ 552.301(e)(1)(D). We acknowledge your representation to this office that you enclosed with your correspondence “all materials requested,” however, we do not find in the submitted documents information responsive to item 3, nor do you represent to this office that the submitted documents comprise a representative sample of responsive information. *See also* Open Records Decision No. 561 at 8 (1990) (governmental body must make good faith effort to relate a request to information which it holds). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov’t Code § 552.302); Open Records Decision No. 319 (1982). You have not shown such a compelling interest to overcome the presumption that the information at issue is public. Accordingly, you must release the requested information. We caution that the distribution of confidential information constitutes a criminal offense. Gov’t Code § 552.352.<sup>1</sup> We next address the submitted documents.

Before addressing the exceptions you have asserted, we find that certain documents contained in files 2 and 3 consist of or contain information that is subject to section 552.022 of the Act. In pertinent part, section 552.022 provides that the following categories of information “are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

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<sup>1</sup>Because you have not submitted the information, we have no basis for finding it confidential. Thus, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Gov't Code §552.022(a)(1), (3), (10), (13), (14). We have marked the documents at issue with green flags. As noted above, section 552.103 is a discretionary exception under the Act and does not thereby constitute other law that makes any of the documents we have marked expressly confidential. The documents contained in files 2 and 3 that are marked with green flags are therefore subject to release to the requestor.<sup>2</sup> However, we find that two documents contained in file 3, which we have also marked with a red flag, contain information that is or may be expressly confidential under other law and therefore subject to redaction prior to release of the documents, as discussed below.

Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the city must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). As to the first prong, you have demonstrated that litigation was pending against the city at the time the city received the present requests, in that you

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<sup>2</sup>Some of the green-flagged documents in file 2 contain information about the requestor that is confidential with respect to the general public. However, the requestor has a special right of access to this information. *See* Gov't Code § 552.023.

have submitted for our review a copy of a summons and the plaintiff's original complaint in the matter of *Domingo Juarez, Jr. v. The City of Rockdale, et. al.*, No. WOCCA295, in the United States District Court for the Western District of Texas, Waco Division. As to the second prong, we find that the information contained in files 1, 2, and 3 relate to the litigation, and that section 552.103 is therefore applicable to these files. Except as otherwise noted below, the city may therefore withhold the information contained in files 1, 2, and 3 pursuant to section 552.103. However, because you have not demonstrated that any of the information contained in file 4 relates to the pending litigation, none of this information is excepted under section 552.103.

Absent special circumstances, once information has been obtained by all opposing parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing party in the pending litigation has seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. In this instance, we have marked with green flags documents in file 1 that evidently came from the opposing party. Because no section 552.103 interest exists in these documents, we conclude they must be released to the requestor. We also note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>3</sup>

You also assert section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act.<sup>4</sup> See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, we shall address the section 552.102 assertion for the information contained in file 4 by next

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<sup>3</sup>Files 1, 2, and 3 contain information that is confidential by law and therefore must not be released to the general public. See Gov't Code § 552.352. Because we find this information to be excepted under section 552.103, we do not separately address the confidential information. In the event the city receives a request in the future for this information, at a time when section 552.103 no longer applies, the city should therefore again seek a decision of this office.

<sup>4</sup>Section 552.101 of the Act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

considering the extent to which this information is excepted from disclosure under section 552.101 in conjunction with the common law right to privacy.<sup>5</sup>

Common law privacy excepts from disclosure information if (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). A public employee's allocation of his salary to a *voluntary* investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy if the transactions are not funded in whole or in part with public monies. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1992) (deferred compensation plan). Where a transaction is funded in part by the state, however, it involves the expenditure of public monies in which there exists a legitimate public interest and the transaction therefore is not protected by privacy. Open Records Decision No. 600 (1992). We have marked the personal financial information at issue. Assuming this information pertains to voluntary decisions made by the individual and the transactions are not funded in whole or in part with public monies, we find the financial information we have marked must be withheld under sections 552.101 and 552.102. We have also marked certain information pertaining to the identity of a juvenile suspect, which we find must be withheld under section 552.101 in conjunction with the common law right to privacy.

The remaining information in file 4, however, is not protected by a right of privacy and may not be withheld on that basis. *See* Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

In addition to common law privacy, section 552.101 also excepts from disclosure information made confidential by statute. File 4 includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime

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<sup>5</sup>This decision also addresses the extent to which the green flagged documents that are otherwise subject to release pursuant to section 552.022, as discussed above, contain information that is or may be subject to required redaction as information that is expressly confidential under other law. The green flagged documents that contain such information have also been marked with red flags, and we have marked on these documents the specific information at issue.

and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the Form I-9 is confidential under section 552.101 and must not be released to the requestor.

File 4 also includes an employee W-4 form, which is excepted from disclosure by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). In addition, information on a federal W-2 form regarding the amount of federal income and FICA tax withheld and total FICA wages is also excepted by section 6103(a) of title 26 of the United States Code. Open Records Decision No. 226 (1979). We have therefore marked for redaction this information.

Certain documents in file 4 consist of criminal history record information (“CHRI”). Criminal history record information generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the CHRI which must be withheld.

File 4 also includes a medical evaluation, and declaration of psychological and emotional health from the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code provides as follows:<sup>6</sup>

- (a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

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<sup>6</sup>The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

We have marked the documents that must not be released pursuant to section 1701.306 of the Occupations Code.

One document in file 4 contains the social security number of a member of the public, which we have marked. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

Section 58.007(c) of the Family Code states:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

This provision applies to juvenile law enforcement records concerning conduct of a juvenile offender or suspect occurring on or after September 1, 1997. File 4 contains certain information that constitutes juvenile law enforcement records and that involves conduct that occurred after September 1, 1997, which we have marked. The information we have marked must be withheld under section 552.101 in conjunction with section 58.007 of the Family Code.

File 4 also includes one page of an accident report form that appears to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). The Seventy-fourth Legislature amended section 47 of article 6701d, V.T.C.S. to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident.<sup>7</sup> Further, the Seventy-fourth Legislature also repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change.<sup>8</sup> In section 13 of Senate Bill 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances.<sup>9</sup> However, a Travis County district court has issued a permanent injunction enjoining the enforcement of the amendment to section 550.065 of the Transportation Code enacted by section 13 of Senate Bill 1069. *Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has declared that the law in effect prior to the passage of Senate Bill 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill 1069 was section 47 of

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<sup>7</sup>See Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.

<sup>8</sup>See Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71. Because the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, the amendment of section 47 of article 6701d, V.T.C.S. is preserved and given effect as part of the code provision. *See* Gov't Code § 311.031(c). In 1997, the Seventy-fifth Legislature enacted Senate Bill 898 and amended section 550.065 of the Transportation Code to conform to section 47 of article 6701d as enacted by the Seventy-fourth Legislature and repealed article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49.

<sup>9</sup>Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). The Seventy-fifth Legislature also repealed section 47 of article 6701d, V.T.C.S. in section 16 of Senate Bill 1069. *Id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583.



article 6701d, V.T.C.S.<sup>10</sup>, which therefore governs the availability of accident report forms completed pursuant to chapter 550 of the Transportation Code. Section 47(b)(1) of article 6701d provides that:

The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

....

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1). *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.<sup>11</sup> Under this provision, a law enforcement agency employing a peace officer who made an accident report “is required to release” a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, however, the requestor has not provided the city or the city’s police department with the date of the accident, the name of a person involved in the accident, or the location of the accident. Therefore, the city must withhold in its entirety the accident report form contained in file 4, which we have marked.

The submitted documents additionally contain information that is subject to section 552.117(2) of the Act and that therefore must be withheld. Section 552.117(2) excepts from public disclosure a peace officer’s home address, home telephone number,

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<sup>10</sup> Although the Seventy-fifth Legislature enacted Senate Bill 898 prior to the passage of Senate Bill 1069, Senate Bill 898 was not effective until September 1, 1997. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill 1069 expressly provides that to the extent of any conflict, Senate Bill 1069 prevails over another Act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted at the same session of the legislature, the latest in date prevails. Gov’t Code § 311.025(b). Because Senate Bill 898 was never effective and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S. was the law in effect prior to the passage of Senate Bill 1069 regarding the availability of accident report information rather than section 550.065 as amended by Senate Bill 898.

<sup>11</sup> We note that the text of amended section 47 of article 6701d is not found in Vernon’s Revised Civil Statutes or in the Transportation Code. However, section 47 of article 6701d is published in the 1995 General and Special Laws of the 1995 Legislature at chapter 894, section 1.

social security number, and information indicating whether the peace officer has family members. *See* Gov't Code § 552.117(2). We have marked the information which you must withhold under section 552.117(2).

Finally, file 4 also contains driver's license numbers. Section 552.130(a) of the Act excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. We have marked the information that you must withhold under section 552.130(a). The remaining information in file 4 is not excepted from disclosure and must be released to the requestor.

In summary, information that is responsive to the requests and that was not submitted for our review must be released to the requestor. The city may withhold the information in the submitted files 1, 2, and 3 pursuant to section 552.103, as discussed above, except the city must release to the requestor the documents in these three files that we have marked with green flags. To the extent the green flagged documents contain information that is or may be confidential as discussed herein, such documents have also been marked with red flags. The city must redact from these documents the information we have marked, to the extent that the information is confidential as discussed herein. None of the documents in file 4 are excepted by section 552.103. The documents in file 4 that contain or consist of confidential information have been marked with red flags, and these documents must be withheld or redacted as provided herein. The remaining information in file 4 is not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

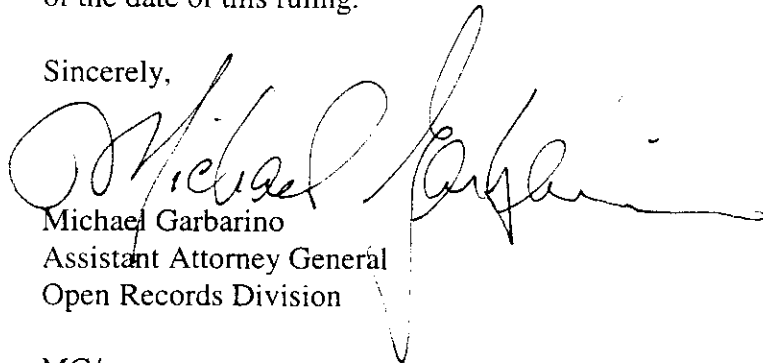
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 143575

Encl. Submitted documents

cc: Mr. Clayton Evans  
216 Division Street  
Rockdale, Texas 76567  
(w/o enclosures)